

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PAUL KEVIN DIRSCCELL

Defendant-Appellant.

---

UNPUBLISHED

August 2, 2002

No. 230533

Jackson Circuit Court

LC No. 00-03752

Before: Murray, P.J. and Murphy and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit a felony, MCL 750.110, and third degree fleeing and eluding, MCL 750.479(A)(3). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12 to concurrent terms of 76 to 240 months' imprisonment for the conviction of breaking and entering and 58 to 240 months' imprisonment for the conviction of fleeing and eluding. Both sentences were to be served consecutive to his parole violation. Defendant appeals as of right. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant first argues that the trial court erred in permitting the prosecutor to amend the information on the day of trial. We find that this argument lacks merit. This Court will not disturb a trial court's grant of an amendment on appeal unless the defendant was prejudiced in his defense or a failure of justice resulted. MCL 767.76; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

As we recently explained:

'MCL 767.76 . . . provides that the court may amend an information at any time before, during, or after trial.' *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998). The *Goecke* Court further noted that "[t]he rules of criminal procedure as adopted in 1989 implement[ed] then existing law to provide that the court may permit the prosecutor to amend the information unless to do so 'would unfairly surprise or prejudice the defendant.'" *Id.* at 459-460, quoting MCR 6.112(G). These rules were further clarified in *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001), which stated that "[a]n information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information

and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime.” If the amendment does charge a new crime, there may be a possible violation of the defendant’s right to receive a preliminary examination. *People v Weathersby*, 204 Mich App 98, 104; 514 NW2d 493 (1994). [*People v Jones*, \_\_\_\_ Mich App \_\_\_\_; \_\_\_\_ NW2d \_\_\_\_ (2002) (Docket No. 238220, issued 6/21/02)].

Furthermore, “[a]n information shall not be filed against any person for a felony until such person has had a preliminary examination, . . . as provided by law, before an examining magistrate.” MCL 767.42(1); *People v Price*, 126 Mich App 647, 653; 337 NW2d 614 (1983), abrogated in part on other grounds as stated in *People v Fortson*, 202 Mich App 13; 507 NW2d 763 (1993).

In the case at bar, the original information charged defendant with breaking and entering at 1502 Cooper Street. On the day of trial, the prosecutor moved to amend the information to show the address as 815 Lansing Avenue. Defendant objected on the grounds that he specifically waived his right to a preliminary examination because the address in the information was 1502 Cooper Street. The trial court permitted the amendment and offered to remand the matter to the district court for a preliminary examination on the amended information. In response, defense counsel stated:

May I have just a - - a moment here, your Honor. Mr. Dirschell thanks you Honor for the opportunity of going down to district court. However, feeling that there is sufficient error in the cause at this point, he would just as soon opt to proceed to trial. Thanks.

In accord with the above, though his attorney, defendant expressly declined the remedy at the trial court level of which he now asserts as error in the instant appeal. It is well-settled that a defendant may not decline relief in the trial court and then submit it as error on appeal before this Court. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Such a result we cannot sanction. On the record here before us, we do not find the requisite prejudice inuring to defendant or otherwise find that a failure of justice occurred in this regard.

Next, defendant contends that the trial court erred in refusing to redact portions of defendant’s statement to police that the vehicle he was driving was stolen and that on the day of the arrest, he had been buying crack cocaine and was running out of money. This Court reviews the admission of similar acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Pursuant to MRE 404(b), evidence of other crimes or wrongs “is not admissible to prove the character of a person in order to show action in conformity therewith.” However, other acts evidence may be admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material.” MRE 404(b). Under the applicable evidentiary rules, other acts evidence must be offered for a proper purpose, it must be relevant, and its probative value must not be substantially outweighed by unfair prejudice. *People v VanderVliet*, 444 Mich

52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Further, the trial court may, upon request, provide a limiting instruction to the jury. *Id.*

In the case at bar, the statements objected to were clearly relevant for permissible purposes. Defendant told police that he heard the siren but was not going to stop because he was driving a stolen vehicle. This is directly relevant to defendant's motive and intent on the charge of fleeing and eluding. The statement that he was running out of money from purchasing crack cocaine provides evidence of his motive and intent relative to the breaking and entering with intent to commit larceny charge. Accordingly, the trial court did not abuse its discretion in refusing to redact the statement.

Affirmed.

/s/ Christopher M. Murray  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly